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CERTIORARI AS A REMEDIAL WRIT IN VIRGINIA.

The writ of certiorari as an ancillary proceeding to the writs of *error* and *supersedeas* and to appeals is familiar to the profession in Virginia. Upon suggestion of a diminution of the record, its invocation as a means of bringing the omitted segment before the Appellate Court is frequent. But in its wider scope and greater power as a common-law remedial writ, it seems to have fallen into disuse in this State. The cause of this is not clear. It is true, that under our judicial system a review of the proceedings of inferior courts by appeal or writ of error or supersedeas is made general and speedy, and that the extraordinary legal and equitable writs are applicable to most inferior tribunals, and that in these facts may be found at least a partial explanation of the infrequency of the use of this writ. But the same is also true of the judicial systems of other jurisdictions in which its remedial power has been more often recognized and where its common-law efficacy is frequently invoked in practice. There are, doubtless, other causes for its disuse in a state in which the common-law procedure is a distinctive feature of its system of jurisprudence, which a discussion of the subject may disclose. 4 Minor's Ins. 1372.

In a recent case, the common-law power of the writ was invoked in Virginia in a proceeding which attracted public attention at the time, and after full argument in the Supreme Court of Appeals, the jurisdiction of the Circuit Court to award it in the particular case was denied by *prohibition*. Prior to that case, the most recent expression of the Supreme Court of Appeals on the point is believed to be that in Com. *v.* Mackaboy, 2 Va. Cas. 270, although a later case not precisely on the point is that of Hay *v.* Pistor, 2 Leigh 707.

As the court in the recent case first mentioned, Commonwealth ex rel. Osborne et als. *v.* Tyler, Judge, did not express the reasons for its judgment in a written opinion, merely entering a formal order to effectuate it, the profession is without an expression

from our court of last resort as to the proper use of the writ when it issues from a court to an inferior tribunal exercising judicial, or quasi judicial, functions, not according to the course of the common law, to whose judgment no appeal, writ of error or review is specifically provided.

The one point in that case was the jurisdiction of a circuit court to review by certiorari the proceedings of a visitorial board in the exercise of its power to remove for cause a public officer elected by it. In the order entered by the court of appeals upon the writ of *prohibition* awarded against the Judge of the Circuit Court who had issued the *certiorari,* the general jurisdiction of the circuit court was demed. But, as stated, the reasons for the judgment are not reported. The facts were that F. was occupying an executive office created by the Constitution which, by the terms of that instrument and the statutes enacted in pursuance thereof, was elective and removable for certain specified causes by the general board of visitors of the institution of which he was superintendent. This board was created and its powers defined by the constitution. In the exercise of its powers, it preferred charges and specifications against F. and after due notice proceeded to hear evidence. Counsel appeared for the board and the respondent. The testimony of many witnesses and the documentary evidence made a voluminous record. Objections of various kinds were made and exceptions were noted as in court of record. After the evidence was in, but before judgment, the circuit court of the jurisdiction in which the record was kept, on petition of the respondent issued a common law *writ of certiorari* commanding the members of the board to certify the entire proceedings to it to be further proceeded in according to law. To this action of the circuit court, the Supreme Court of Appeals issued a rule to the judge of the circuit court to show cause why a writ of *prohibition* should not be awarded against it on the *certiorari* proceedings. The judge answered and on the hearing, the writ of prohibition issued, and thus denied the general jurisdiction of the circuit court to award the *certiorari.* None other than the jurisdictional question could he consider on the *prohibition.* High on Ex. L. R., §§ 767, 767a, 767b and cases cited. It was thought until then to be the established rule in Virginia that *prohibition* would never issue to re-

strain any inferior court from exercising jurisdiction in any *particular* case if the inferior court had general jurisdiction, in any case, of the subject matter; for that is the function of a *writ of error.* 4 Minor's Ins., 386 citing *Ex parte Ellyson,* 20 Gratt. 24; Hogan *v.* Guigon, 29 Gratt. 706; Supervisors *v.* Wingfield, Judge, 27 Gratt. 331; Nelms *v.* Vaughan, 84 Va. 698, 5 S. E. 704 Vide, also, Griggs *v.* Dalsheimer, 88 Va. 510, 13 S. E. 993; Shell, Judge, *v.* Cousins et als., 77 Va. 333. The case of Cunningham *v.* Squires, 2 W. Va. 422 is directly in point. There the Supreme Court held that *prohibition* would not lie to the circuit court to restrain its review on *certiorari* of the proceedings of a board of supervisors in the matter of a contested election of a circuit clerk, the constitution in that State conferring jurisdiction of the writ on the circuit courts in language similar to the present statute in Virginia. Const. W. Va., art. 6, § 6 (1863). See, also, Const. W. Va., 1872, art. 8, § 12.

The award of the writ of prohibition disposed of this particular case; but, it may still be inquired how far is the order awarding it to be understood as being *stare decisis* of the particular point, to wit; the general jurisdiction of our circuit courts to issue the writ of *certiorari* to boards and tribunals exercising judicial or quasi judicial functions, out of the course of the common law, when no specific mode of reviewing their judgments is provided. If the action of the appellate court is to be construed as disposing of the point as effectually as it did the case, then the power of administrative public boards, officers and tribunals, at least to remove subordinate officers for specific cause, is absolute and beyond the supervision of the courts. It may be doubted that the appellate court intended to establish such a rule; and, in the absence of an expression of the reasons which constrained its judgment, it may be interesting to observe (a) the province of the writ of *certiorari* as a remedy in such cases at common law; (b) the extent to which its common law efficacy has been preserved with us.

(a) THE PROVINCE OF THE WRIT AT COMMON LAW.

In Bacon's Abridgement, Certiorari, title A, the writ is defined as being "an original writ issued out of the chancery of the King's bench, directed in the King's name to the judges or offi-

cers of inferior courts commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause." The Supreme Court of Massachusetts in the case of Farmington River W. P. Co. *v.* Berkley County Commissioners, 112 Mass. 206, says: "A certiorari is a writ issued from a superior court to an inferior court, tribunal or officer, exercising judicial powers, whose proceedings are summary or in a course different from the common law, commanding the latter to return the records of a cause pending before it to the superior court."

After quoting at length the two foregoing definitions of the writ, Harris in his treatise on Certiorari at page 2 adds:

"It is a common-law writ, but now in this country it is generally provided for by statute. In the absence of such statute, and when no adequate mode of review is provided by writ of error, appeals or otherwise, from the decisions of inferior courts or tribunals, the circuit or district courts have inherent power of revision, having general original common-law jurisdiction, and may bring up such records by *certiorari* for that purpose." Citing Miller *v.* School Trustees, 88 Ill. 26; Donahue *v.* Will County, 100 Ill. 94; Hyslop *v.* Finch, 99 Ill. 171. Vide, also, Cooper *v.* Saunders, 1 Hen. M. 413, and Mackaboy's Case, 2 Va. Cas. 270.

The rule is clear that the petitioner must have a special and direct interest in the proceeding sought to be reviewed and not a general interest. It is not enough that he be a party, he must show an interest. Colden *v.* Botts, 4 Wend. 234 (N. Y.); Harris on Certiorari, § 15; 9 Century Digest, *Certiorari* 44, Col. 1802, and cases. It is likewise established as the general rule that no other adequate remedy is available. Welch *v.* County Court, 29 W. Va. 63, 1 S. E. 337; Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653; Woodin *v.* Phoenix, 32 Am. Rep. 172 (Mich.); Auzerias *v.* Superior Court, 101 Cal. 541. And the writ lies to review only judicial, or quasi judicial acts, and never to review those of a legislative, ministerial or discretionary character. People *v.* Walter, 68 N. Y. 403; People *v.* Board of Com., 97 N. Y. 37; People *v.* Kelly, 24 N. Y. 74; Commissioners *v.* Kane, 2 Jones 288; Ketchum *v.* Superior Court, 65 Cal. 494; Tiedt *v.* Carstensen, 61 Iowa 334; State *v.* Busby, 44 N. J. L.

627; Livingston *v.* Rector, 45 N. J. L. 230; In re Saline County Subscription, 100 Am. Dec. 337 (Mo.); People *v.* Supervisors, 131 N. Y. 468; People *v.* Martin, 40 Am. St. Rep. 592. Note to Mayor *v.* Morgan, 18 Am. Dec. 236; 9 Century Digest, *Certiorari,* B. §§ 18, 20, Cols. 1757, 1761.

It would extend the scope of this note beyond its narrow limitations to do more than indicate that when founded upon the foregoing essentials, common-law *certiorari* lies to review the judicial or quasi judicial actions of boards of supervisors, police commissioners, city and town councils, various local boards, courts-martial, governors of states and public officers of an inferior grade, boards of assessors, boards of equalization, etc., whenever the complainant would be otherwise without remedy. "It is generally used in such cases as might otherwise, without its intervention, leave the party remediless. It is considered as an extraordinary remedy resorted to for the purpose of supplying a defect of justice in cases obviously entitled to redress and yet unprovided for by the ordinary forms of proceeding." Poe *v.* Machine Works, 24 W. Va. 520. Vide 2 Michie's Ency. Digest of Va. & W. Va. Rep. 741; Harris on Certiorari, §§ 17, 18, 19, 20, 21, et seq.; 4 Ency. Plead. & Prac. 39, 40. Note to Mayor *v.* Morgan, 18 Am. Dec. 232; note to Duggen *v.* McGruder, 12 Am. Dec. 536; Cunningham *v.* Squires, 2 W. Va., 423-4.

Embarrassment may arise in distinguishing in some cases, a judicial act from one of a legislative or ministerial nature, and the reason for much of the conflict in the authorities is traceable to the shadowy line which sometimes separates judicial from non-judicial action. But no embarrassment of that nature arises in the case of the removal of an officer for cause specified, after notice. The exercise of an arbitrary power to remove is an executive act; but when the removal depends upon the existence and establishment of certain causes, the common law requires that charges and specifications shall be furnished the officer and that he shall be given an opportunity to be heard upon them. This carries with it the right of the accused to answer the charges, to demand proof, and to call witnesses in his defense. The act of removal in such cases reaches the dignity of a judicial act and is reviewable by certiorari. Aldermen *v.* Darrow, 16 Am. St. Rep. 220; Dullan *v.* Willson, 51 Am. Rep. 137, quoting Chief

Justice Marshall; Mechem on Public Officers, §§ 455, 456; Dillon on Mun. Corp., §§ 245, 250, 253, 254.

In the note to Wulzen *v.* Supervisors, 40 Am. St. Rep. 45, the editor, who was of counsel in the principal case, says on this point: "If, however, the law vesting the authority (of removal) either in the governor, or in some local body, or otherwise, indicates that such authority shall be exercised for cause only, and either expressly or by implication that the officer against whom the proceeding is shall have notice thereof, and of the charges against him and shall be entitled to be heard and produce evidence in his defense, then the proceeding is judicial in character because the power to hear and determine is to be exercised, as in courts, only after notice and a hearing on the merits, and the officer is recognized as having a right in his office of which he cannot be deprived except for proper cause ascertained by a proceeding judicial both in its form and its consequence."

The commentator points out the fact that *certiorari* is not a substitute for *quo warranto* and will not try the title to an office nor oust a *de facto* officer. State *v.* Brown, 53 N. J. L. 162; Donough *v.* Dewey, 82 Mich. 309; State *v.* City Council of Camden, 39 N. J. L. 416; Coyle *v.* Sherwood, 4 Thompson and C. 45; note to Duggen *v.* McGruder, 12 Am. Dec. 536. Yet if an officer is removable only for cause, and no remedy is provided by appeal or otherwise, "he is entitled to *certiorari* under the same circumstances and for the same causes as in other judicial or quasi judicial proceedings." Board of Aldermen *v.* Darrow, 16 Am. St. Rep. 215; Biggs *v.* McBride, 17 Ore. 640, 21 Pacific 878; People *v.* Nicholas, 79 N. Y. (c) 582; Merrick *v.* Arbela Township, 41 Mich. 631, 2 N. W. 922; Mayor *v.* Shaw, 16 Ga. 172; State *v.* Dodge, 56 Wis. 79, 13 N. W. 680; Harris on Certiorari, §§ 134, 500; Mechem on Pub. Off., § 1011; State *v.* Duluth, 53 Minn. 238, 39 Am. St. Rep. 595; Throop on Pub. Off., §§ 379, 392; Guger *v.* Supervisiors, 10 N. W. 186; McGregor *v.* Supervisors, 37 Mich. 388, in which Judge Cooley delivered the opinion of the court, holding that *certiorari* lay to review the action of the supervisors in removing a county treasurer from office.

(b) THE EXTENT TO WHICH ITS COMMON LAW EFFICACY HAS BEEN PRESERVED IN VIRGINIA.

Certiorari, as a common law remedial writ, is preserved in Virginia by §§ 3, 3058 and 3218, Code of 1904, as it existed in England prior to the fourth year of the reign of James I. It has received neither enlargement of scope nor modification of power at the hands of the legislature. No mention of the writ is to be found in the article in the Constitution creating the judicial system; but by § 3058 of the Code, of 1904, general jurisdiction to grant *certiorari* is bestowed on the circuit courts; and by § 3218 the particular, or territorial, jurisdiction is delimited.

"Section 3058. The circuit courts shall have jurisdiction of proceedings by *quo warranto,* or information in the nature of *quo warranto,* and to issue writs of *mandamus, prohibition,* and *certiorari* to all inferior tribunals created or existing under the laws of state," etc.

"Section 3218. Jurisdiction of writs of mandamus, prohibition and certiorari (except such as may be issued from the court of appeals) shall be in the circuit court of the county, or in the circuit or corporation court of the corporation, wherein the record or proceeding is to which the writ relates."

In 4 Minor's Ins., part 1, page 367, the uses to which *certiorari* may be put at common law are set forth. The author says: "(2). The cause may be removed where the proceedings are summary, and not according to the course of the common law, in order that the court issuing the writ may inspect the proceedings, and determine whether there has been any material irregularity therein; and if so to quash them. (Ex parte Yerger, 18 Wal. 85.)"

Mr. Barton in 11 Barton's L. P., § 296, seems to confine its use to bringing up proceedings before a justice with a view of inquiring into their regularity, and cites 4 Minor's Ins., 1372, Oddly enough, Professor Minor after making a bare reference to the use of *certiorari* for that purpose, cites no adjudicated case. But he does not make the reference in a restrictive sense, and it is not apparent that he confined the use of the writ to that purpose. The Virginia cases presently to be referred to indicate that it had a wider scope in our practice, and Mr. Minor himself in another connection (4 Minor's Ins., p. 367), quoted above, recognizes its more extended application.

SELDOM USED IN VIRGINIA.

Being thus preserved to us in its original form and vigor, and possessing such a wide remedial scope at common law, it is remarkable that the number of reported cases in Virginia in which it has been employed as a means of review may be counted on the fingers of a hand. Still the cases reported leave no doubt of the recognition by our courts of its common law power as a remedy.

The case of Cooper *v.* Saunders, 1 Hen. & M. 413, was decided at the October term, 1807. Judge Tucker said in his opinion in answer to the argument that no remedy was available:

"A writ of *certiorari* lies at common law to examine and affirm or reverse proceedings and judgments in inferior courts: and for the purposes of removing not only legal but equitable proceedings, it lies from the High Court of Chancery in England to all inferior courts unless expressly exempted by the words of a statute. I have always supposed that the general court as originally constituted (Oct. 1777 C. 17) in conformity with the apparent intention of the constitution, possessed every power, jurisdiction and authority, that a court of common law could possess except in original suits of less value than ten pounds and appeals under the same amount."

Judge Tucker in the later case of Wingfield *v.* Crenshaw, 3 Hen. & M. 247 (decided November 1808), approves his views expressed in the opinion in Cooper *v.* Saunders, *supra*, and holds that according to the distinction taken by Lord Chief Justice Holt in 1 Salk. 144 and 263, wherever Parliament creates a new jurisdiction and the court is a court of record acting in the course of the common law, a writ of error lies on their judgments; but where they act in a summary way, or in a new course different from the common law, *certiorari* lies. He refers to 1 Lord Raymond 580, 1 Burr. 377, 2 Burr. 1040, 3 Burr. 1458, 4 Burr. 2244, 1 Black Rep. 231, Cowper 458, 7 Term Rep. 373 and 2 Saund. 101, a.

The case of Triplett *v.* Tyler, 4 Hen. & M. 413, was a chancery case decided at the September term, 1808, and the opinion holds merely that the petition for the *certiorari* must be accompanied by the copy of the record sought to be reviewed. It is expressed in six lines.

In Mackaboy's Case, 2 Va. Cas. 270, which was decided at

the November term, 1821, the question adjourned to the General Court by the Superior Court was:

Can a *certiorari* be properly awarded after verdict against rioters under the act for the suppression of riots, etc?

The General Court said: "As (to) the first question, it may be observed that it is a general rule *well established* (italics mine) that in cases before justices of the peace, orders, summary proceedings and trials before newly created jurisdictions, who proceed not according to the course of the common law; and where the party cannot have a writ of error, he shall have a certiorari." Citing 1 Lord Raymond 469; 7 Term Rep. 369.

Another *certiorari* case was decided in 1830 and is reported in Hay *v.* Pistor, 2 Leigh 707. There the General Court denied the jurisdiction of the circuit court to award a *certiorari* to the county court on the facts. The petitioner had, however, already availed of his right of appeal from the judgment of a justice to the county court, where the judgment for $33.33 was affirmed. He then sought to have the proceedings in the county court reviewed by *certiorari* in the circuit court. The question was adjourned by the circuit court to the General Court. The General Court rested its judgment of denial on two grounds; first, that the invocation of *certiorari* as a substitute for the writ of *error* or *supersedeas* had never been sanctioned in Virginia; and second that the statute specifically limited the pecuniary jurisdiction of the circuit courts to amounts of one hundred dollars and over, whether the proceedings were sought to be brought before them by original process, *habeas corpus*, appeal, *writ of error, supersedeas, mandamus, certiorari* to remove proceedings for any purpose, or by other legal ways and means whatever." In stating the reason for its denial on the first ground, after remarking that if *certiorari* lay in such a case it might bring to the appellate court a judgment of a justice for one cent, Judge May says:

"The Court would be reluctant to sustain a proceeding which might lead to such consequences; and especially one which for the purpose now sought to be effected may be regarded as almost obsolete in this Commonwealth. We know of no instance, in which this writ has been used in Virginia, as a mere substitute for the *writ of error* or *supersedeas*."

In a criminal case involving a similar question (decided July

1831) the court in Tankersly *v.* Lipscomb, 3 Leigh 813 (800, marginal) held that *certiorari* did not lie from the Circuit Court of Henrico to the Hustings Court of the City of Richmond because the latter court is a court of record. In that case, as in Hay *v.* Pistor, *supra,* the petitioner had already availed of her right to appeal to the Hustings Court from the judgment of the mayor assessing a fine of ten dollars, where the judgment was affirmed.

If the amount of the fine had not been below the statutory amount giving the Circuit Court appellate jurisdiction, petitioner's remedy to a court of record was by *writ of error* and not *certiorari.*

The cases above cited possibly do not embrace all of those to be found in the Virginia reports, but they are sufficient in number and positive enough in expression to leave no doubt of the remedial power in our practice of *certiorari,* at the common law, and to indicate that it survives in Virginia as at common law. In none of the cases cited was there dissent to the doctrine.

WHEN IT WILL ISSUE.

The stage of the proceedings at which the writ will lie is an important consideration. There is diversity of views in some jurisdictions, but in Virginia and West Virginia, as at common law, the rule is that *certiorari* will go before as well as after judgment. Mackaboy's Case, 2 Va. Cas. 268; Morgan *v.* Ohio, etc., Co., 39 W. Va. 17, 19 S. E., 598; Bee *v.* Seaman, 36 W. Va. 381, 15 S. E. 17; 4 Ency. Plead. & Prac. 41; 2 Michie's Digest, Ency. Dig. Va. & W. Va. Rep. 748.

The rule stated in 4 Ency. Plead. and Prac. 41, is that in American jurisdictions the writ will go before the inferior tribunal has consummated its authority; and that in England it will go at any stage of the proceedings. In Mackaboy's case, *supra,* the first proposition was specifically held by Judge Tucker to be the law, and this case is cited in support of the text.

WHAT IT BRINGS UP FOR REVIEW.

There is also diversity of views in the various states as to what *certiorari* brings before the reviewing court for its determination. It was thought at one time that only questions of law and jurisdiction could be reviewed. In Tidds Practice (3 Am. Ed.) 398, note a, it is said:

"A Supreme Court has power by common law to review the proceedings of all inferior tribunals, and to pass upon their jurisdiction and decisions of questions of law. But unless a statute confers the power of reviewing determinations of inferior tribunals upon questions of fact, such determinations are conclusive and cannot be reversed on *certiorari*." But this rule has been gradually enlarged by most of the American courts in the adjudicated cases. Judge Green in his elaborate opinion in the case of Dryden *v.* Swinburne, 20 W. Va. 106-107, states that in this jurisdiction the superior court would review and correct such errors of law or fact of the inferior tribunal as it might correct on a writ of error to a court of record. He cites a large number of authorities on the point; and concludes, upon a review of the cases, that *certiorari* brings up for correction all errors of law in the record, including all action taken on evidence before the inferior tribunal on erroneous principles or any action taken by it in the absence of evidence to justify it.

Mr. Freeman, in the note to Wulzen *v.* Supervisors, 40 Am. St. Rep. 35, summarizes the general rule as follows:

"It is a fair summary of the decisions upon this topic to say that in those states in which the evidence may be brought before the superior court upon *certiorari* that court may examine it, not for the purpose of determining the credibility of witnesses or the weight to be given conflicting testimony, but solely for the purpose of determining whether, from competent evidence before it, the decision of the inferior court is sustainable, and if so, such decision cannot be set aside as against or not supported by the evidence, and on the other hand, if there was no competent evidence to sustain such decision, it must be annulled."

The authorities cited by the commentator are in harmony with the conclusion expressed by Judge Green in the case of Dryden *v.* Swinburne, *supra*.

As an effective writ of review of the proceedings of inferior tribunals which act judicially, or in a quasi judicial manner, the use of *certiorari* in some of the states will appear from the reference hereinbefore made. Its availability as such is not confined, however, to the jurisdictions mentioned. It is in use in practically all of the states. In West Virginia, the scope of the writ has been enlarged by statute, Code of W. Va., 1899, ch. 110, § 2

to § 6; but before its common-law jurisdiction was thus extended, it was frequently to be met with in the reports of that state; and the elaborate opinions of its court of last resort evince the learning of its judges as well as the effectiveness of the writ, under their construction of its province, in England and in our practice. Its present scope in that state supplies and fills whatever hiatus may exist in other writs or modes of review for all judicial proceedings of courts, officers and tribunals, with the single exception of judgments of justices for less than fifteen dollars. Foose *v.* Vandervoort, 30 W. Va. 327, 4 S. E. 298.

Being untrammeled in Virginia by statutory provisions and possessing as at common law revisatory powers unknown to other extraordinary remedies, it has occasioned surprise that its efficacy is so seldom invoked in our practice. In the days of Mackaboy *v.* Com., *supra,* it was of unchallenged power within its jurisdiction. In the later days of Com. ex rel. Osborne et als. *v.* Tyler, Judge, its vigor has departed. Yet the reason thereof does not appear in the books.

> "But yesterday the word of Cæsar might
> Have stood against the world; now he lies there,
> And none so poor to do him reverence."

Why is it so?

J. T. LAWLESS

Norfolk, Va., Jany. 29, 1908.